STATE OF MICHIGAN

COURT OF APPEALS

FAARGSOB L.L.C., AUTO SPORTS UNLIMITED, INC., SUZANNE LEE BOSGRAAF as Trustee of the Suzanne Lee Bosgraff Trust, and SUZANNE LEE BOSGRAAF TRUST,

Plaintiffs-Appellants,

UNPUBLISHED
August 23, 2007

v

No. 268482
Ottawa Circuit Court
LC No. 03-047895-CK

HTSTS, L.L.C., JOLDERSMA, INC., f/k/a HOLLAND TRANSMISSION SERVICE, INC., TERRY JOLDERSMA, and SCOTT JOLDERSMA,

Defendants-Appellees.

Before: Bandstra, P.J., and Cavanagh and Jansen, JJ.

PER CURIAM.

In this breach of contract action, plaintiffs appeal as of right. We affirm.

I

Plaintiffs Faargsob, L.L.C. (Faargsob) and Auto Sports Unlimited, Inc. (Auto Sports)[1] entered into a contract with defendant Holland Transmission Services, Inc. (Holland Transmission)[2] for the purchase of an automotive transmission service business. Under the terms of the contract, plaintiff Suzanne Bosgraaf, as trustee of the Suzanne Lee Bosgraaf Trust, agreed to purchase real property from defendant HTSTS L.L.C. (HTSTS). HTSTS is a holding company that leased land and equipment to Holland Transmission. Defendants Terry and Scott Joldersma owned both HTSTS and Holland Transmission.

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[1] Faargsob is apparently a leasing company that leases equipment to Auto Sports. Scott Bosgraaf, who is Suzanne Bosgraff's husband, owns Faargsob and Auto Sports.

[2] Holland Transmission Service, Inc., subsequently changed its name to Joldersma, Inc.

Terry and Scott Joldersma operated Holland Transmission. The business enjoyed healthy sales and growth. Terry Joldersma and Scott Bosgraaf entered into an informal dialogue regarding the sale of the business. Bosgraaf determined the value of the business from three years of Holland Transmission's tax returns (1998 to 2000). Terry Joldersma rejected Bosgraaf's initial offer of $2,000,000, making a counteroffer of $3,300,000. Terry Joldersma forwarded additional financial statements, which demonstrated substantial growth in sales. Bosgraaf adjusted his previous valuation calculation, and made an offer of $2,654,579, which was accepted. Among other things, the purchase agreement included non-compete covenants to be executed by Terry and Scott Joldersma.

Bosgraaf assumed control of Holland Transmission in November 2001. However, he left the Joldersmas' management team in place. Bosgraaf learned of some inventory irregularities in early 2002, which prompted an internal investigation. Bosgraaf then discovered that the Joldersmas made certain adjustments at the end of the year on their inventory that were not relevant to any transaction. Bosgraaf was suspicious, and he noted that a "balancing account" had increased almost $500,000 over a two-year period. Bosgraaf began to question the information on which he had based his valuation of the business.

After the sale, Scott Joldersma went to work for one of Bosgraaf's other businesses, which rebuilt automatic transmissions. He worked for Bosgraaf until February 2003, when Bosgraaf laid him off. Thereafter, Scott Joldersma worked for other mechanic shops and also started his own general repair shop. Bosgraaf learned of Scott Joldersma's business activities, and plaintiffs sent Scott Joldersma a notice stating that he was in breach of the covenant not to compete.

Plaintiffs filed an amended complaint, alleging various counts of breach of contract, unjust enrichment, fraudulent misrepresentation, innocent misrepresentation, and breach of the covenant not to compete. A number of the counts were dismissed during pretrial proceedings. However, trial proceeded on the remaining seven counts: (1) breach of contract for failure to pay a special assessment, (2) breach of contract for overstating sales, (3) breach of contract for overstating expenses, (4) an alternate count of breach of contract for overstating expenses, (5) breach of contract for overstating costs, (6) breach of contract for overstating inventory, and (7) breach of a covenant not to compete. The jury found that defendants were obligated to pay the special assessment. But it also found that defendants were not liable for providing inaccurate tax returns and financial statements, for overstating costs and expenses, or for overstating inventory. The jury further found that defendant Scott Joldersma had breached the non-compete covenant by engaging in transmission repair work, but that plaintiffs were not entitled to withhold the amounts payable to defendant Scott Joldersma. The jury awarded plaintiffs damages in the amount of $200,000.

Defendant Scott Joldersma moved for JNOV with respect to the jury's verdict concerning the covenant not to compete. The trial court commented that "a jury just can't pull a number out of the air," and it asked what evidence supported the jury's award of $200,000. Plaintiffs' counsel contended that the competition caused "good will damage," and that there was testimony regarding referrals to the businesses where Scott Joldersma was working. Plaintiffs' counsel also asserted that there was evidence that Scott Joldersma had done independent repair work for one of Holland Transmission's largest customers. The trial court ruled that "[t]here was no evidence to support the jury verdict of $200,000 for breach of the covenant not to compete." The trial court noted that Scott Joldersma had merely performed "a job or two or three," causing minimal damage to defendants. The trial court concluded:

> [T]he record is devoid of any method by which the jury could calculate damages in the amount of $200,000. And I am not going to enter [J]NOV. I am going to order a new trial on that issue, which I think moots your—What you have left with [plaintiffs'] claim for attorney fees at this point, is a $22,000 recovery and a potential additional recovery if we retry the issue of the breach of a covenant not to compete. And I am going to simply withhold ruling on your request for attorney fees until the litigation is resolved.

Defendant Scott Joldersma then moved for partial reconsideration of the trial court's order granting a new trial as to damages. On reconsideration, the trial court rescinded its order for a new trial as to damages, and granted JNOV in favor of defendants with respect to this issue.

Plaintiffs then moved for JNOV, or in the alternative, for a new trial on the claim that defendants had breached the contract by overstating expenses, costs, and inventory. Plaintiffs argued that defendants had provided inaccurate information at the time of sale, which resulted in an overpayment of $678,000. The trial court concluded that only one inference could logically be made based on the jury's verdict: "The jury did not believe that plaintiffs met their burden of proof on each of the elements of the cause of action." The trial court determined that the jury had accepted the testimony of defendants' witnesses, and that there was accordingly sufficient evidence to support the verdict on this claim. Thus, the trial court denied plaintiffs' motion for JNOV or a new trial

II

Plaintiffs argue that the trial court erred in granting JNOV on the issue of damages resulting from the breach of the covenant not to compete. We disagree. We review de novo a trial court's ruling on a motion for JNOV. *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 272; 696 NW2d 646 (2005). In doing so, we consider the evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Reed v Yackell*, 473 Mich 520, 528; 703 NW2d 1 (2005). "A trial court should grant a motion for JNOV only when there was insufficient evidence presented to create an issue for the jury." *Attard v Citizens Ins Co of America*, 237 Mich App 311, 321; 602 NW2d 633 (1999). Moreover, "a case should not be submitted to the jury where a verdict must rest upon conjecture or guess." *Scott v Boyne City, G&A R Co*, 169 Mich 265, 272; 135 NW 110 (1912). "[A] trial court should grant a party's motion for JNOV with respect to . . . damages if the jury was permitted to speculate concerning the amount of those damages." *Attard*, *supra* at 321. Lastly, issues of contract interpretation present questions of law, which we review de novo. *46th Circuit Trial Court v Crawford Co*, 476 Mich 131, 140; 719 NW2d 553 (2006).

The party asserting a breach of contract has the burden to prove his damages with reasonable certainty, and may recover only those damages, which are the direct, natural and proximate result of the breach. *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003). When a plaintiff proves injury, recovery is not precluded simply because proof of the amount of damages is not mathematically precise. *Severn v Sperry Corp*, 212 Mich App 406, 415; 538 NW2d 50 (1995). However, damages that are based on speculation or conjecture are not recoverable. *Berrios v Miles, Inc*, 226 Mich App 470, 478; 574 NW2d 677 (1997). A trial court should grant JNOV if the jury engaged in speculation in reaching its damages determination. *Kallabat v State Farm Mut Auto Ins Co*, 256 Mich App 146, 151; 662 NW2d 97 (2003); *Attard, supra* at 321.

It is undisputed that Scott Joldersma breached the covenant not to compete. Additionally, the validity of the covenant not to compete was unchallenged. Therefore, the issue presented in this case is whether the trial court appropriately granted JNOV and took the matter away from the jury with respect to the award of damages only.

The covenant not to compete contained a remedies provision in paragraph five, which provided:

> In the event that the Shareholder breaches any of the covenants contained in this Agreement, and fails to correct such default within thirty (30) days, then the Buyer shall be entitled to any and all remedies and rights at law or in equity, and such rights and remedies shall be cumulative. Without limiting the foregoing, upon determination that a breach has occurred by a court of competent jurisdiction the Buyer shall be entitled to withhold any amounts payable by the Buyer (a) to the Shareholder pursuant to this Agreement and (b) any amounts payable to the Seller pursuant to a Land Contract of even date hereof but only to the extent of the lesser of: (i) the amount of damages determined by a court of competent jurisdiction or (ii) 40% of the land contract payments then owing under Sections 2 and 3 on Payments in Exhibit A to the Land Contract. The Shareholder further agrees that any violation of this Agreement is likely to cause such damage to the Buyer as may be irreparable or impossible of ascertainment. The Shareholder agrees that the Buyer shall, as a matter of course, be entitled to an injunction issued out of any court of competent jurisdiction pertaining to any violations hereunder. The prevailing party in any litigation relating to this Agreement shall be entitled to reimbursement for the prevailing party's costs and expenses, including without limitation, reasonable attorney fees and legal expenses.

In construing a contract, we give the words used their plain and ordinary meanings. *Rory v Continental Ins Co*, 473 Mich 457, 464; 703 NW2d 23 (2005). Upon a breach of the covenant not to compete, plaintiffs were entitled to withhold certain amounts payable to the shareholder under the terms of the purchase agreement, and certain amounts payable to the seller under the land contract. The covenant not to compete clearly defines Scott Joldersma as the shareholder, and the seller is defined as Holland Transmission. The contractual language authorized plaintiffs to withhold any amount due under the land contract, provided that the amount was "the lesser of: (i) the amount of damages determined by a court of competent jurisdiction or (ii) 40% of the land contract payments then owing under Sections 2 and 3 on Payments in Exhibit A to the Land Contract." In other words, the covenant's remedies clause called for the lesser of (1) actual damages, as determined by a court of competent jurisdiction, or (2) a fixed amount of 40 percent of the land contract's outstanding balance. There was no testimony indicating how many payments had already been made. However, the instructions to the jury indicated that 40 percent of the land contract balance was $338,127.60.

Bosgraaf's testimony was vague regarding the actual damages that resulted from the breach. There was testimony that Scott Joldersma performed transmission work for four customers, and Bosgraaf produced one invoice that amounted to $1,913. However, he was unable to determine the profit Holland Transmission would have made on this job. Further, he did not know if the aforementioned customers would have gone to Holland Transmission if Scott Joldersma had not performed the work. There was little or no testimony indicating that Holland Transmission had lost any profits as a result of Scott Joldersma's breach of the covenant.

We note that an agreement by a business owner not to engage in business for a specified period and providing for a reasonable payment in the event of a breach is a valid liquidated damages provision. See *Geiger v Cawley*, 146 Mich 550, 552; 109 NW 1064 (1906). However, this is not a case involving a classic liquidated damages provision. While this Court has upheld reasonable liquidated damages provisions in the context of non-compete covenants, *St Clair Medical v Borgiel*, 270 Mich App 260, 271; 715 NW2d 914 (2006), the parties' contractual remedy provision at issue in this case did not specify any particularized amount of damages to be paid in the event of a breach of the covenant not to compete. Instead, the contractual language at issue here effectively left the calculation of the ultimate amount of damages to the jury, but limited that ultimate amount to 40 percent of the land contract's outstanding balance.

The proper measure of damages for a breach of contract is the pecuniary value of the benefits the aggrieved party would have received if the contract had not been breached. *Ferguson v Pioneer State Mut of Michigan*, 273 Mich App 47, 54; 731 NW2d 94 (2006). As noted above, "[t]he party asserting a breach of contract has the burden of proving its damages with reasonable certainty," *Alan Custom Homes*, *supra* at 512, and "damages based on speculation or conjecture are not recoverable," *Berrios*, *supra* at 478. We recognize that damages need not be ascertained with absolute mathematical precision. *Id*. However, in this case there was no evidence tending to show that defendants were damaged in the amount of $200,000 by Scott Joldersma's breach of the covenant not to compete. Rather, after a review of the record, it appears to us that the jury simply chose an arbitrary amount between zero and 40 percent of the outstanding land contract balance of $338,127.60. Because the jury necessarily engaged in conjecture or speculation in making this determination, we conclude that the trial court did not err in granting JNOV on the issue of damages in this case. See *Kallabat*, *supra* at 151; *Attard*, *supra* at 321.

III

Plaintiffs also argue that the trial court erred in denying their motion for JNOV or a new trial with respect to their claims that defendants breached the contract by overstating expenses, costs, and inventory. Again, we disagree. "A trial court should grant a motion for JNOV only when there was insufficient evidence presented to create an issue for the jury." *Attard*, *supra* at 321. A new trial may be granted when the verdict is against the great weight of the evidence. MCR 2.611(A)(1)(e); *Domako v Rowe*, 184 Mich App 137, 144; 457 NW2d 107 (1990). Although we review de novo the trial court's ruling on a motion for JNOV, *Garg*, *supra* at 272, we review for an abuse of discretion the trial court's decision to grant or deny a motion for a new trial, *Damako*, *supra* at 111.

"Because plaintiffs bore the burden of proving their breach of contract claim, to sustain their motion for JNOV, plaintiffs were essentially required to establish that the evidence they presented was so substantial that the jury had no reasonable choice but to accept plaintiffs' version." *Badiee v Brighton Area Schools*, 265 Mich App 343, 365; 695 NW2d 521 (2005). Similarly, the grant of a new trial because the verdict was against the great weight of the evidence is disfavored, and the jury's verdict must not be set aside if there is competent evidence to support it. *Ewing v Detroit*, 252 Mich App 149, 169-170; 651 NW2d 780 (2002), rev'd on other grounds 468 Mich 886 (2003).

The primary goal in the construction or interpretation of any contract is to honor the intent of the parties. *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998). If there is no ambiguity or internal inconsistency, then contract interpretation begins and ends with the actual words of the written agreement. See *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 354; 596 NW2d 190 (1999).

The parties in the case at bar do not dispute that there was a validly executed contract. Plaintiffs assert that defendants breached their promise to provide accurate financial statements and documents. Section 7 of the agreement contained the "representation and warranties of the sellers" provision. Under this section, defendants agreed to the following:

> (m) Financial Statements. The Seller has delivered to the Buyer certain financial statements for the Business for the fiscal years ending June 30, 1998, 1999, and 2000, and such documents represent a true and accurate representation of the current financial condition of the Business, and the statements do not contain any untrue statement of a material fact, and do not omit any material fact necessary or desirable to make the financial statements an accurate representation of the financial status of the Business. To the best of the Seller's knowledge, there are no undisclosed adverse circumstances or conditions which have had a material adverse [e]ffect, or which may have a material adverse [e]ffect, on the financial condition of the Business as it currently exists.
>
> (n) Validity of Documents. This agreement, the schedule attached hereto, and any document, statement, or certificate delivered by the Seller and/or the LLC to the Buyer and/or the Trust, or to be delivered by the Seller and/or the LLC to the Buyer and/or the Trust, do not contain any untrue statement of a material fact and do not omit any material fact.

Bosgraaf testified regarding how he determined the value of Holland Transmission. However, several months after the purchase, he learned of some problematic accounting practices. Bosgraaf testified about alleged multiple sets of accounting documents. These multiple sets of documents were the MAVIS computer perpetual inventory system, the trial balance spread sheet, and the tax returns or financial statements. While Bosgraaf's testimony might have supported a finding that the Joldersmas engaged in careless or questionable accounting practices, Bosgraaf admitted that the inventory played no role in his own valuation of the business. Bosgraaf also admitted that he did not take a hands-on approach in the management of Holland Transmission and that no inventory audit was conducted until well after he took control of the business.

Plaintiffs' expert testified that to determine how much plaintiffs overpaid, it was necessary to look to the discrepancy between the perpetual inventory and the tax returns.

However, plaintiffs' expert also admitted that his opinion wholly depended upon the accuracy of the perpetual inventory system. The expert conceded that perpetual inventory systems are notoriously inaccurate for small business like Holland Transmission.

The testimony at trial indicated that although the MAVIS perpetual inventory system had shortcomings, it was not used for tax preparation purposes. There was also testimony tending to show that defendants provided true and accurate financial information and that defendants did not conceal any unfavorable financial matters from plaintiffs. Defendants' former manager testified about Holland Transmission's problems with the MAVIS computer system and his effort to clean up the perpetual inventory. He indicated that a truly accurate perpetual inventory would require all workers to record each piece of inventory in minute detail and that such a practice would be difficult to implement in a busy transmission shop. In recording inventory, the former manager and Terry Joldersma testified that the larger, more expensive items were all counted, while a best-guess estimate approach was used for the smaller items. Further, Terry Joldersma testified that he kept accurate financial records, and there was testimony that Holland Transmission was in a strong financial position at the time of the sale to plaintiffs. For instance, Holland Transmission had paid the Joldersmas' salaries, had paid down its debt, had made charitable contributions, had paid its bills on time, and had showed a profit.

Based on the evidence presented at trial, reasonable minds could have concluded that Terry Joldersma disclosed true and accurate financial information to defendants. Accordingly, there was a sufficient basis for the jury to conclude that §§ 7m and 7n of the agreement were not breached. Plaintiffs' belief that they overpaid for the purchase of Holland Transmission was based on the opinion of their expert, who in turn relied on the supposed accuracy of the perpetual inventory system in giving his testimony. However, plaintiffs' expert undermined his own position by conceding that the perpetual inventory system might not be accurate.

There was conflicting testimony and evidence regarding defendants' accounting practices and concerning whether defendants breached their warranty of providing accurate and true financial information to plaintiffs. When there is conflicting evidence and the jury's determination turns at least in part on issues of witness credibility, the jury verdict should ordinarily not be disturbed. See *Ewing*, *supra* at 170. It is the province of the jury to determine the credibility of witnesses, to resolve conflicts in the evidence, and to decide the disputed issues. *Martel v Duffy-Mott Corp*, 15 Mich App 67, 73; 166 NW2d 541 (1968). Viewing the evidence in the light most favorable to defendants, we conclude that the trial court did not err in denying plaintiffs' motion for JNOV because there was sufficient evidence presented to create an issue for the jury. *Attard*, *supra* at 321. Although plaintiffs bore the burden of proving their breach of contract claim, they failed to establish that the evidence presented at trial was so substantial that the jury had no reasonable choice but to accept their position. *Badiee*, *supra* at 365. Nor did the trial court abuse its discretion in denying plaintiffs' motion for a new trial. The jury's verdict was not against the great weight of the evidence and was supported by competent evidence. *Ewing*, *supra* at 169-170.

Affirmed.

/s/ Richard A. Bandstra
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen